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The principle of Subsidiarity and the new proposed Protocol

1. Introduction

The debate over the principle of subsidiarity is a debate of a constitutional nature which reflects concerns over the way Community competence is exercised, together with wider worries for the lack of accountability in the law-making process. There is a wide-spread feeling that the Union lacks an efficient monitoring procedure to ensure compliance with the principle, which is left to the goodwill of the European institutions and to the, somehow deficient, scrutiny of national Parliaments under domestic constitutional arrangements. For this reason, the mandate to Working Group I on subsidiarity, identified as the main area for investigation the possibility of creating new monitoring procedures. Acknowledging that the principle is mainly political, the mandate referred to various possible non-judicial mechanisms to ensure compliance with the principle: the creation of a Mr/Ms Subsidiarity entrusted with the task; the possibility of involving national Parliaments either by including them in the legislative procedure (such as allowing representatives of national Parliaments to sit in Council); or by enhancing control of the positions taken by the Governments; the possibility of creating a new *ad hoc* body entrusted with monitoring the compliance with the principle of subsidiarity. The mandate also referred to the possibility of enhancing judicial scrutiny identifying several possible solutions, such as the creation of a subsidiarity chamber in the ECJ; the setting up of a form of co-operation between the ECJ and national Constitutional Courts; the broadening of the jurisdiction of the Court so as to provide scrutiny also over Title V and VI of the EU Treaty (Second and Third Pillar); the possibility of providing an *ex-ante* judicial scrutiny; the amendment of Article 230 EC so as to grant standing to national Parliaments; or to the *ad hoc* body should this be set up; and to the Committee of the Regions. The Working Group has now produced a Draft of the Protocol on Subsidiarity and Proportionality. The main innovation proposed by the Working Group relates to a new procedure granting national Parliaments the possibility to lodge reasoned opinions on compliance of proposed legislation with the principle of subsidiarity. This paper will first analyse the existing situation, to then turn to consider the system proposed by the Working Group.

2. The origin of the principle

The principle of subsidiarity was first established in the Single European Act in relation to the exercise of Community competence in environmental matters.¹ In 1992, it was introduced as a

¹ The literature on subsidiarity is copious. See e.g. G. De Burca “Reappraising Subsidiarity’s Significance after Amsterdam”, Jean Monnet Paper, <http://www.jeanmonnetprogram.org/papers/99/990701.html>; and “The principle of

general principle in Article 5 EC Treaty (*ex* Article 3b), which provides that in areas of non-exclusive competence the “Community shall take action, (...), only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community”. Article 5 spells also out the principle of proportionality according to which “Any action by the Community shall not go beyond what is necessary to achieve” the Treaty objectives.

The Treaty of Amsterdam introduced a Protocol on the application of the principles of Subsidiarity and Proportionality;² this provides *inter alia* that:

- proposed legislation should contain reasons to justify its compliance with the principles of subsidiarity and proportionality and be substantiated by qualitative and where possible quantitative criteria;
- the Commission shall justify its proposals with regard to the principle of subsidiarity;
- the Commission shall submit an annual report on the application of the principle of subsidiarity.

There is widely felt scepticism on whether the principle of subsidiarity has had a real impact on the law-making practice of the Community. If the Commission is entrusted with justifying its proposals according to the principle, and members of Council should monitor that the Commission’s proposals actually comply with it, this is often not the case.

3. Subsidiarity and the Commission

In its yearly reports, the Commission is eager to stress how the number of proposals for legislation put forward has significantly decreased in the last ten years (from 797 in 1990, to 316 in 2002). However, the Commission itself admits that the figures might be misleading in that they also reflect the fact that the “Community has reached a stage of maturity with regard to the objectives of the Treaty and the existing *acquis*”.³ In other words, the decrease in legislative proposals is also the result of greater achieved integration, and not just the result of the introduction of the principle of subsidiarity. This said, the decrease is so significant that it might well be that the introduction of the principle of subsidiarity has determined some self-restraint on the part of the institutions. This

Subsidiarity and the Court of Justice as an institutional actor” (1998) *Journal of Common Market Studies* 217-235; N. MacKormick “Problems of Democracy and Subsidiarity” (2000) *EPL* 531-542.

² The Protocol substantially codifies the approach taken at the Edinburgh European Council of December 1992, (1992) *OJ C* 337, 116.

³ Report from the Commission “Better Lawmaking 2002” COM(2002) 715 final, point 3.1. See also previous reports all available on www.europa.eu.int. See also the Commission’s White Paper on European Governance, COM(2001) 428 final.

notwithstanding, once there is a political will to act, compliance with the principle of subsidiarity seems more questionable, and scepticism seems to be more than justified. Few, by no-mean exhaustive, examples might illustrate the point. Council Directive on the “keeping of wild animals in zoos” is in this respect a good demonstration of how the principle of subsidiarity, once there is a will to regulate, might be little more than a cosmetic principle.⁴ The Preamble to the directive states that “The proper implementation of existing and future Community legislation on the conservation of wild fauna and the need to ensure that zoos adequately fulfil their important role in the conservation of species, public education, and/or scientific research make it necessary to provide a common basis for Member States’ legislation with regard to the licensing and inspection of zoos, the keeping of animals in zoos, the training of staff and the education of the visiting public” and that “action at Community level is required in order to have zoos throughout the Community contributing to the conservation of biodiversity in accordance with the Community’s obligation to adopt measures for *ex situ* conservation” according to the Convention on Biological Diversity. The text of the Directive does not suggest there to be any cross-border issue which would be better dealt at Community level: indeed the only possibility of cross-bordering seems to arise from the danger that animals could escape from zoos.⁵ Of course this directive regulates an area which would not raise much concern amongst public opinion or national Parliaments as to a possible loss of regulatory competence and state sovereignty. The same cannot be said of two recent proposals for directives which touch upon criminal and civil law proceedings: the proposed directives on compensation to crime victims,⁶ and on legal aid.⁷ The explanatory memorandum to the former, in assessing the need for Community harmonising rules, states that disparities in national legislation concerning compensation for crime “can only appear arbitrary from the perspective of the citizen. Such unfair and arbitrary effects are not compatible with establishing the EU as an area of freedom, security and justice for all.” As for the explicit assessment of subsidiarity, the Commission just refers to the quoted section to state that there is clearly a Community dimension to the problem and that: “The necessary approximation of the laws of the Member States and the mechanisms needed for cross-border situations can be better achieved by the Community than by the Member States acting alone and will thereby provide an added value”.⁸ It is rather surprising that this is all the

⁴ Council Directive 1999/22/EC of 19 March 1999, relating to the keeping of wild animals in zoos, OJ L 94/1999, p. 24-26.

⁵ See also Directive 98/6/EC of 16 March 1998, on consumer protection in the indication of the prices of products offered to consumers, OJ L 80/1998 p. 27-30, which applies also to purely static consumer transactions.

⁶ Proposal for a Council Directive on compensation to crime victims, COM(2002) 562 final.

⁷ Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules to legal aid and other financial aspects of civil proceedings, COM (2002) 13 final.

⁸ Section 5.3 of the explanatory memorandum.

justification needed for a measure for which the Treaty does not provide an express legal basis (the Directive is to be adopted under Article 308 EC).

The assessment of subsidiarity is similarly disappointing for the proposed Directive on legal aid,⁹ which provides for a general right to legal aid for people without sufficient resources. The explanatory memorandum to the Directive states that “The measure aims to establish cooperation procedures between Member States and to approximate certain national provisions by establishing common minimum standards.” It then continues “as these objectives cannot be achieved by the Member States acting alone, it requires action at Community level”.

The fact that such important pieces of legislation should provide such a concise, if not altogether circular assessment of the need for Community action, might well explain why the Subsidiarity and Proportionality Protocol has been considered ripe for change. Further, the scrutiny operated by Council might not prove very effective: sometimes underlying national political tensions might make it easier for governments to act at European rather than national level.

4. The principle of subsidiarity in the case law of the European Court of Justice

If “political” monitoring of the principle of subsidiarity might be considered at present ineffective, judicial monitoring is even more difficult. It is recognised that questions relating to the level at which regulation should be adopted are mainly of a political nature, and the European Court of Justice might find it difficult to adjudicate on the matter. Indeed, the Court has so far refrained from taking an interventionist stance in monitoring compliance of legislation with the principle of subsidiarity.

In the *working time* directive case,¹⁰ the UK argued that a measure could be considered proportionate only if it also complied with the principle of subsidiarity, and that it was for the Community legislature to demonstrate that the aim pursued by the Directive could be better achieved at Community level. The Court held that since Council had found that there was a need to harmonise then it meant that there was need for Community action.

In the *deposit guarantees* case,¹¹ Germany brought a challenge to the deposit guarantee directive arguing *inter alia* that the Community legislature had failed to give reasons according to Article 253 (*ex* Article 190) in relation to the subsidiarity principle, i.e. it had failed to state the need for Community action.¹² The Court dismissed the claim by holding that the preamble to the Directive stated that it was “indispensable to ensure a harmonised minimum level of deposit protection” and

⁹ Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules to legal aid and other financial aspects of civil proceedings, COM (2002) 13 final.

¹⁰ C-84/94 *UK v Council* (Working Time) [1996] ECR I-5755, para 47 and 55.

¹¹ C-233/94 *Germany v Council* (Deposit Guarantees) [1997] ECR I-2405, para 26.

¹² The Protocol had not been enacted at the time.

that thus in the legislature's view action at Community level was needed. The Court again seemed reluctant to render the subsidiarity principle justiciable, albeit in this case Germany was arguing not that the measure *per se* failed to comply with the principle but rather that it failed to state the necessity of Community action.

In the *biotechnology* directive case,¹³ the Court found that even though the Preamble to the directive was silent as to the matter, compliance with the principle of subsidiarity was "implicit" in the recitals which dealt with the need to harmonise.

Also, some confusion as to the possible scope of the principle of subsidiarity has been created by the fact that the principle only applies to areas of non-exclusive competence of the Community. In this respect some Advocates General have argued that competence in relation to the internal market is exclusive and thus the principle of subsidiarity does not apply.¹⁴ In the second *tobacco advertising* case,¹⁵ the Court, consistently with the approach now endorsed by the Convention,¹⁶ clarified that the principle of subsidiarity applies also to the internal market. It should, however, be borne in mind that since internal market competence can be exercised only to eliminate obstacles to movement or appreciable distortions of competition, if there is competence, then almost automatically Community action is going to be more effective than action at national level. In internal market cases then subsidiarity might be relevant, if at all, in assessing whether single provisions of the relevant instrument comply with the need to legislate as closely as possible to the citizen, rather than to assess the need to legislate at Community level.

Furthermore, even in cases which do not relate to the internal market, the Court might well be unwilling to interfere with political choices if there is no issue about competence. In relation to proportionality, a principle which is considered more readily justiciable, the Court has adopted a non-interventionist approach.¹⁷ Thus though in principle subsidiarity might be a justiciable issue, in practice there is an understandable reticence of the Court in substituting its own judgement for that of the institutions, in assessing a choice which is ultimately perceived as political.

¹³ C-377/98 *Netherlands v Parliament and Council* (Biotechnology) [2002] ECR I-6229, opinion para 75-84. Ruling para 30-34.

¹⁴ Cf AG Léger in C-233/94 *Germany v Council* (Deposit Guarantees) [1997] ECR I-2405, opinion para 90; AG Jacobs in C-377/98 *Netherlands v Parliament and Council* (Biotechnology), opinion para 75-84; AG Fenelly in C-376/98 *Germany v Parliament and Council* (Tobacco advertising) [2000] ECR I-2247, opinion para 132-145.

¹⁵ C-491/01 *The Queen v Secretary of State for Health*, ex parte *British American Tobacco and Imperial Tobacco Ltd*, ruling of 10/12/02. Opinion para 285-287, ruling para 174-185.

¹⁶ But the as it stand at present the text of the draft Constitution is unclear. See M. Dougan in this contribution, p..

¹⁷ C-280/93 *Germany v Council* [1994] ECR I-4973. N. Reich "Judge made 'Europe à la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation" (1996) EJIL 103-111.

5. The role of national Parliaments in the existing system

At present those who deny the existence of a democratic deficit in the Community, also rely on the fact that the members of Council are directly accountable to national Parliaments under national constitutional arrangements. This said, it is broadly recognised that the scrutiny of national Parliaments is deficient, partially because of the very process of Community legislating, but also because of time and interest. In attempting to render the scrutiny of national Parliaments more effective, the Amsterdam Treaty introduced a Protocol on the role of National Parliaments. This provides that all Commission consultation documents have to be “promptly” forwarded to the national Parliaments; that Commission proposals for legislation “shall be made available in good time”; and that, except for cases of urgency, a minimum of six weeks must elapse between when the proposal is made available to the EU institutions, and when it is placed on the Council’s agenda. Further, the Protocol also provides that the Conference of European Affairs Committees (COSAC)¹⁸ might make any contribution it deems appropriate to draft legislation, including initiatives and proposals made under the third pillar when those affect individuals’ rights and freedoms. Also, COSAC might address the institutions in relation to subsidiarity and fundamental rights.

The monitoring of European legislation is thus primarily left to national constitutional arrangements, and it is felt as not being particularly effective.

6. The proposed Protocol

Having regard to the existing situation of unsatisfactory political monitoring, and difficult judicial scrutiny, the Working Group proposed a new system whereby national Parliaments would acquire a formal role in monitoring compliance with the principle of subsidiarity.¹⁹ Thus, the powers of scrutiny of national Parliaments would be significantly enhanced both through a redefinition of the Commission’s obligations and through the establishment of a formal monitoring procedure.

In the proposed Protocol, the principle of subsidiarity is spelled out in a considerably less detailed fashion than in the existing one. Thus, paragraph 1 provides that “Each institution shall ensure

¹⁸ COSAC was established in 1989 and consists of representative of the relevant committees in the national Parliaments and of members of the European Parliament. At present it meets every six months.

¹⁹ On the debate building up to the Convention see the European Parliament Committee on Constitutional Affairs “Report on the division of competences between the European Union and the Member States” (so called Lamassoure Report), FINAL A5-0133/2002. See also the “Mandate of the Working Group on the principle of subsidiarity”, CONV 71/02.

constant respect for the principles of subsidiarity and proportionality” (emphasis added) (...). The references to maintaining the *acquis*, to the powers conferred to the Community and to the dynamic nature of the principle of subsidiarity have been deleted. The commentary states that this “reduced” and “simplified” version has been adopted in order to make it “compatible” with the nature of a Protocol annexed to the Constitution. It is unlikely that these changes will have any “legal” impact: however, they highlight a certain political reticence in stressing that some principles are not affected by the principle of subsidiarity. Further the amended language seems to suggest that the institutions are under a duty to continue vigilance (and not only in relation to their own actions): it is not clear if this would translate in a duty to repeal legislation should, because of changes in circumstances, it cease to comply with the principle of subsidiarity.

Paragraph 2 provides that, except in cases of urgency or confidentiality, the Commission shall consult widely. It also states the duty, where appropriate, to take into account the “regional and local” dimension of the envisaged action, which is not spelled out in the existing Protocol.

Paragraph 3 introduces an obligation for the Commission to send its proposals to national Parliaments at the same time as to the Union legislator (in the existing Protocol they must be sent “as soon as possible” and “promptly”). It also places an obligation on the European Parliament and Council to send resolutions and common positions as soon as they are adopted.

Paragraph 4, introduces the duty for the Commission to attach a “subsidiarity sheet” to the proposed legislation and it details the issues which should be addressed in the assessment (such as financial implications but also implications for the rules to be put in place by Member States, and where necessary the regional dimension). As said above, the Court has so far not considered the lack of an “explicit” subsidiarity assessment as an essential procedural requirement capable of affecting the legality of the measure under attack. It is not clear whether the more detailed obligation placed upon the Commission by the proposed Protocol will have any bearing on the Court’s approach.

Following the date on which the proposed legislation is received, National Parliaments would have six weeks to lodge a reasoned opinion. It is left to the national Parliaments to make the internal arrangements for bicameral Parliaments. Thus it would be for each Parliament to decide whether the reasoned opinion could be adopted separately by each chamber. The proposed amendments to the Protocol suggest that each Parliament should be given two votes so that those systems which do not

have bicameral Parliaments would carry the same weight as those which have bicameral Parliaments.

The Protocol then provides that European Parliament, Council and Commission should take account of the National Parliaments' reasoned opinions. This would probably mean that failure to comply with the six weeks standstill provision could constitute a breach of an "essential procedural" requirement.²⁰ It is not clear whether grounds of urgency might justify a derogation. Paragraph 5, unlike paragraph 2 on the Commission's duty to consult, does not refer to such possibility. However, paragraph 4 of the proposed Protocol on the role of National Parliaments in the European Union provides that the six weeks period might be derogated from on grounds "of extreme urgency, the reasons for which shall be stated in the act or common position".²¹ It is to be hoped that this discrepancy between the two texts is going to be remedied in the final draft.

If one third of national Parliaments lodge reasoned opinions on the non-compliance of the proposal with the principle of subsidiarity, the Commission is under a duty to review its proposal (this seems to be an essential procedural requirement), but it can maintain it nonetheless. The Protocol also places upon the Commission a duty to give reasons (also this should be an essential procedural requirement). Further, national Parliaments might lodge a reasoned opinion also in the period between the date in which the conciliation meeting under the co-decision procedure is convened and the date in which the meeting actually takes place. European Parliament and Council shall take the "fullest" account of the opinions expressed by national Parliaments. As the text stands at present, there is no duty for the European Parliament and the Council to reconsider, should 1/3 of national Parliaments lodge an opinion at this stage. This is peculiar having regard to the fact that at conciliation stage the proposed legislation might have incurred substantive amendments: it has thus been suggested to either eliminate the possibility of lodging reasoned opinion at this stage, or to make it consistent with the rest of the Protocol by imposing a duty on the institutions to reconsider should the 1/3 threshold be met.

Paragraph 6 and 7 constitute the truly innovative part of the Protocol, in that for the first time national Parliaments acquire a "formal" role in the law-making procedure, even though the idea that national Parliaments could be involved as co-legislators, either by being represented in Council or through a separate chamber, has been rejected. And so far also the idea of granting national parliaments a "veto" power (so called red-card model) has been discarded.

²⁰ Cf Case 138/79 *Roquette Frères SA v Council* [1980] ECR 3333.

²¹ Draft Protocol on the role of national Parliaments in the European Union, (CONV 579/03) para 4. In the existing protocol the six weeks stand-still provision can be derogated from on grounds of "urgency".

The proposed model thus clearly seeks to strike a balance between the political aim to ensure a more effective scrutiny of the way Union competence is exercised and the practical will not to further burden and delay the already complex law making process. However, the protocol raises a number of questions of different nature (political, practical but also legal).

The Community legislative procedure is characterised by the need to balance democratic representation and regional state representation; thus the weighting of the votes in Council and the move towards qualified majority voting which is aimed at ensuring that one country does not hold the legislative process at a ransom. The figure of 1/3 of Parliaments is in this respect rather low. It would allow for a number of countries significantly below the threshold needed to block legislation, to delay the legislative process. It is true that as the proposal stands at present, this is only a “yellow” card, i.e. it does not grant national Parliaments, as some wish, the power to block legislation. However, if the Commission is to take seriously its obligation to reconsider and to give reasons for its decisions, the new procedure might significantly delay a legislative process already characterised by its geological timing.

Secondly, it is not clear whether in order to be counted towards the “1/3” threshold, the reasoned opinions would have to raise the same, or similar, issues, or whether it is enough for Parliaments to have lodged an opinion raising doubts as to compliance with the principle of subsidiarity. If the latter were the case, national Parliaments might well be encouraged just to lodge “pre-emptive” opinions (also given the fact that the 6 weeks time limit is quite tight). If however the former would be the case, as it has been proposed in the amendments, then there would be a problem as to who would assess the “similarity” of the issues. If it were to be the Commission, then there would be a clear conflict of interest. And surely, it would be unwise to involve the Court at such an early stage of the legislative process.

Thirdly, the representations of the interests of the regions is left to the good will of national arrangements. This is all well and fine for those Member States where regions are represented in one of the chambers. It is less so in cases where the devolution process has not produced a chamber representative of regional powers.

Other issues which should be considered are practical and political. From a practical viewpoint the six weeks deadline is very tight, and national Parliaments might well prove not to manage an efficient monitoring role together with their heavy schedule. Another practical issue concerns the difficulty of co-ordination between the various national Parliaments, especially if COSAC keeps on meeting only every six months as it does now.

From a political perspective, there is a risk that national Parliaments be tempted to lodge an opinion not because of subsidiarity, but because of objections to the substantive provisions of the

legislation. Take the internal market example: it seems that once competence to legislate is established, then subsidiarity cannot play a significant role. This is because if there is a cross-border barrier or a distortion of competition, then almost automatically the Community is in a better position to legislate. However, opposition to internal market legislation might derive from a choice over competing values which rejects the idea that economic, or social as the case might be, values should take precedence. This issue, which might well reflect some popular concerns about the way the Community exercises its competence, would not be of relevance in relation to subsidiarity.

The other risk, which again reflects important legitimacy issues, is of course that European legislation be affected by national political dynamics.

Judicial Review

The idea of a preliminary scrutiny by the European Court over compliance with the principle of subsidiarity has been rejected, probably because of concerns over excessively delaying the law-making procedure; and because of the fact that political scrutiny is to be preferred to judicial scrutiny. This said, the Protocol also refers to possibility of judicial review.

In this respect it had been originally proposed to accord *locus standi* to national Parliaments in front of the ECJ: after all if Community competence has been wrongly exercised it affects their prerogatives. The proposed Protocol, however, simply states that “Member States, where appropriate at the request of the national Parliaments,” might bring proceedings. This is, however, already the case since under Article 230 Member States are privileged applicants, and whether the Government must act should the national Parliament so requests, is, and remains, a matter for national law.

The reason why *locus standi* has not been directly vested upon national Parliaments is out of the fear that to do so would undermine the unity of national systems. However, it is unclear why the fear of undermining the unity of the system come into consideration only in relation to *locus standi*, and not in relation to the possibility to lodge reasoned opinions. After all, the system of reasoned opinions seems designed to overcome a failure of accountability of ministers in Council. Thus if pragmatism has won in the first part of the Protocol, by acknowledging that Parliaments and Governments might have differing views which might not be effectively voiced in the present system (it is unlikely that a Government would lose the confidence of its Parliament over a subsidiarity issue), then why is that not the case in relation to review of legislation? The unwillingness to give any tangible powers to national Parliaments thus shows the main shortcoming of the Protocol, which seems designed to merely give a cosmetic role to national Parliaments.

Further, the proposed Protocol provides that the Committee of the Regions acquire standing to bring Article 230 proceedings, albeit only in regard to those acts on which it was consulted. Under the present arrangements Commission and Council have a duty to consult the Committee of the Regions in the following areas: economic and social cohesion, trans-European infrastructure networks, health, education and culture, employment policy, social policy, the environment, vocational training and transport.

Amendments suggested by the Convention to the proposed Protocol.

The most important amendments proposed the Convention concern the inclusion of a scrutiny over compliance with the principle of proportionality and the possibility to grant a veto power to national Parliaments.²² As for inclusion of the principle of proportionality: it should be considered that in this case national parliaments would have a say over substantive issues, i.e. whether the proposed legislation strikes the right balance between competing interests. This depending on the views might be a good or a bad thing. But surely it would change the nature of the scrutiny: proportionality is a more readily justiciable issue than subsidiarity.

As for the introduction of a “red card” procedure: according to this view, if 2/3 of national Parliaments lodged a reasoned opinion the Commission would be under an obligation to, according to the views, either withdraw the proposed piece of legislation or to modify it.²³ Under the Presidium’s proposal qualified majority voting should be substituted by a vote which reflected a single majority of the Member States, representing at least 3/5 of the population. In a Union of 25 with several small and medium Member States, to allow 2/3 of the national Parliaments a veto power, would mean to allow a number of countries representing a population significantly below the threshold needed to block legislation in Council (under the Presidium’s Draft), to stop legislation from being enacted. Further, the idea that national Parliaments are vested with a veto power, poses national constitutional problems, in that it would create and highlight a real fracture between Governments and their Parliaments which would have to rely upon Community law in order to ensure that their representatives in Council do not act against their wishes. If the unity of the State is threaten by the possibility of Parliament having *locus standi*, what would the power to block legislation do to traditional ideas of democracy and accountability within Member States?

²² See generally “Summary sheet of the proposals for amendments to the protocol o

²³ See Ms G. Stuart’s contribution to the Convention “The Early Warning Mechanism – putting it into practice” CONV 540/00, CONTRIB 233; In favour of the red card procedure also the House of Lords Select Committee on the European Union, see the Report on “The Future of Europe: Constitutional Treaty. Draft Articles 24-33, National Parliaments and Subsidiarity – the Proposed Protocols”, CONV 625/03, CONTRIB 279.

Further, in the case the problems relating to who is to assess the similarity of the lodged opinions, if indeed such similarity were to be required, would become of paramount importance.

7. Concluding remarks

It is no secret that sometimes European law has been used to bypass political impasses at national level, and it is no secret that sometimes European law is unnecessary, if not altogether silly. This said, it is to be wondered whether the proposed protocol would have any effect but to further delay the law-making procedure. It is not obvious that such a system would ultimately result in better law-making: institutions have a tendency to enjoy stating their powers against other political institutions.

The debate over subsidiarity is ultimately a political one which betrays not only a distrust over the way Community legislation is enacted, but also a distrust over the traditional working of national governments. It is interesting that, as it often happens in the European political process, the debate concentrates on the former rather than on the latter. The fact that lack of ministerial accountability in relation to European matters is better dealt at European level rather than at national level is ironic: it seems to conflict with the very principle of subsidiarity that the Protocol is aiming at re-affirming.

Further, entrusting national Parliaments with a formal role at European level, might reinforce the citizens' perception that their interests are represented by their national, rather than by the European, Parliament.

The introduction of a general principle of subsidiarity in 1992 and 1997 has failed to produce tangible results: where there is a political will to act there is a way. It remains to be seen whether the new procedure will deliver. The suspicion remains however, that this might end up being just a "tabloid" friendly way of approaching a serious problem (see e.g. the use of hyperbolic language such as the institutions should take the "fullest" account, the meaningless provision on judicial review, and ultimately the fact that National Parliaments have been given but a 'cosmetic' power), rather than an effective and thought-through way to tackle complex issues such as the transparency and legitimacy of the European law-making process.²⁴

²⁴ This impression is reinforced by the way the news of the Protocol is represented by political actors in the media. See for instance Mr Hain's (then UK Government's representative at the Convention) statement that the Protocol was a victory. "If a third of national parliaments tell the commission 'you should not be doing this because it is our show', it is unconceivable the commission would march on regardless". Reported in *The Guardian*, May 14th 2003, at p. 12.